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Andrea Slane

University of Ontario Institute of Technology

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There Is a There There: Forum Selection Clauses, Consumer Protection and the Quasi-Constitutional Right to Privacy in *Douez v. Facebook*

Andrea Slane^{*}

Consumer vulnerability in online transactions has been a prominent issue since the beginning of e-commerce and online service provider contracts,¹ and indeed has continued to present significant concerns where consumers engage with any business

^{*} Associate Professor, Legal Studies, Faculty of Social Science and Humanities, University of Ontario Institute of Technology.

¹ United States Federal Trade Commission (FTC), Bureau of Consumer Protection, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead* (September 2000), <<https://www.ftc.gov/sites/default/files/documents/reports/consumer-protection-global-electronic-marketplace-looking-ahead/electronicmkpl.pdf>>, at 7 [hereinafter “U.S. Federal Trade Commission”] (“Shifting to a pure country-of-origin approach to address challenges inherent in the current system risks undermining consumer protection, and ultimately consumer confidence in e-commerce. The same would be true under a ‘prescribed-by-seller’ approach to the extent it would allow contractual choice-of-law and choice-of-forum provisions dictated by the seller to override the core protections afforded to consumers in their home country or their right to sue in a local court.”). These concerns were raised in Michael Geist’s seminal article on jurisdiction in online contract law in 2001, which the dissent in *Douez v. Facebook*, [2017] S.C.J. No. 33, 2017 SCC 33 (S.C.C.) [hereinafter “*Douez*”] cites, though not for these concerns: “... Consumers anxious to purchase online must also balance the promise of unlimited choice, greater access to information, and a more competitive global marketplace with the fact that they may not benefit from the security normally afforded by local consumer protection laws. Although such laws exist online, just as they do offline, their effectiveness is severely undermined if consumers do not have recourse within their local court system or if enforcing a judgment requires further proceedings in another jurisdiction.”: Michael A. Geist, “Is There a There There? Toward Greater Certainty for Internet Jurisdiction” (2001) 16:3 Berkeley Tech. L.J. 1345, at 1347-48 [hereinafter “Geist”]. See also Geist, *id.*, at 1357-58, where he discusses both legislative efforts and inconsistent court rulings on enforcement of forum selection clauses in consumer contracts already in the early days of the popular Internet.

model relying on digital platforms.² With the majority decision in *Douez v. Facebook*, the Supreme Court of Canada has expanded consumer protection in the context of online contracts, with regard to any statutory privacy rights available to consumers in Canada.³ The decision takes an important further step towards constitutionalizing privacy, and securing means to redress power imbalances online.

With plurality reasons delivered by Karakatsanis J., concurring reasons by Abella J., and a dissent delivered by McLachlin C.J.C. and Côté J., the case as a whole reflects wrangling over the relative significance of both the consumer context and the underlying statutory privacy rights at issue in this case, where the Court is tasked with determining the enforceability of a contractual forum selection clause. Justice Karakatsanis's reasons draw strongly on the special character of privacy protections in Canadian law in order to justify ruling that any forum-selection clause outside of the consumer's home jurisdiction in an online consumer contract is likely to be unenforceable with regard to privacy-based actions.⁴ Justice Abella would invalidate those clauses in the consumer context more broadly. Both sets of reasons acknowledge creating new law, and both point to the development of digital technologies as a motivation for the required change. The dissent did not consider the consumer context nor the underlying statutory privacy rights to merit finding the forum selection clause at issue to be unenforceable in this case, and would not have adapted the current test for forum selection clause enforceability. The majority position is a win for consumer privacy, and is a welcome development in an information ecosphere that has increasingly demonstrated the

² Marina Pavlović, "Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016) 62:2 McGill L.J. 389, at 396 [hereinafter "Pavlović"]; many others are also cited in the decision.

³ *Douez*, *supra*, note 1, at para. 76.

⁴ The Facebook clause at issue read:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

Douez, *supra*, note 1, at para. 8.

vulnerability of consumers to the powerful profit incentives of online businesses, most of which are located outside of Canada.⁵

The relevance of this decision for privacy in our current and future technologically structured social world also derives from its contribution to a trend toward understanding the *Charter of Rights and Freedoms* designation of privacy as a fundamental value to apply not only to state actors, but also to private actors.⁶ This move is particularly appropriate regarding consumer privacy protection in digital environments, where most if not all of the infrastructure is owned by private companies who determine how users' personal information will be handled, and who have proven to require legal constraints to protect user interests.⁷ The decision reflects a modest step toward realizing that our traditional divisions between state and private actors are not as meaningful as they might have been in the pre-digital era: instead, it is power imbalance, fairness, and respect for fundamental rights and values that should determine the obligations of the stronger party *vis-à-vis* the categorically weaker one.⁸

⁵ I have been advocating for seeing consumer protection as the most promising approach to privacy and data protection, tracing the expanding role of the FTC in the United States and the Office of the Privacy Commissioner of Canada in Canada to deal precisely with the wildly unbridled digital data ecosystem. Andrea Slane & Ganaele Langlois, "Debunking the Myth of 'Not My Bad': Sexual Images, Consent and Online Host Responsibilities in Canada" (2018) 30:1 Canadian Journal of Women and the Law 42-81; Andrea Slane, "Search Engines and the Right to Be Forgotten: Squaring the Remedy with Canadian Values on Personal Information Flow" (2018) 55:2 Osgoode Hall L.J. 349-97.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. Application of Charter values to the common law is discussed in several SCC cases such as *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at 675 (S.C.C.) [hereinafter "*Salituro*"]; *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 95 (S.C.C.); and *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.).

⁷ Calls for regulation have been amplified again recently in the face of the Facebook/Cambridge Analytica scandal. These calls are often directed at Facebook — as the supposed "trusted party" in this mess — in the wake of revelations of inaction or outright failure to safeguard users' personal data from such bald faced exploitation, both before and after discovery of the data harvesting. Some commentators have been quick to point out that Cambridge Analytica's use of Facebook users' data is actually really not all that much outside of Facebook's core business model, which has always been very friendly to app developers when it comes to allowing harvesting of user data: Olivia Solon, "A grand illusion: Seven days that shattered Facebook's facade" *The Guardian* (March 24, 2018), <<https://www.theguardian.com/technology/2018/mar/24/cambridge-analytica-week-that-shattered-facebook-privacy>>.

⁸ Andrea Slane, "Information Brokers, Fairness, and Privacy in Publicly Accessible Information" (2018) 4 Canadian Journal of Contemporary and Comparative Law 249-91; Mary Anne Franks, "Democratic Surveillance" (2017) 30 Harv. J.L. & Tech. 425.

This paper will map out the significance of *Douez* along these two lines. First, I will unpack how *Douez* represents progress in the move toward recognizing power imbalance, regardless of whether the seat of that power is government or commercial, as a significant factor in allocating both rights and obligations. Second, I will analyze *Douez* for its contribution to the move toward recognizing the fundamental value of protecting privacy, which in turn further expands protection obligations from state actors to private ones. These moves are fully intertwined in *Douez*, but their development has up until now not been so closely connected: understanding how we got here along these two lines will help to situate how and why the ruling is justified in bringing them together.

Justice Karakatsanis sets out the core reasons for finding the forum selection clause at issue in *Douez* to be unenforceable like this: “The grossly uneven bargaining power between the parties and the importance of adjudicating quasi-constitutional privacy rights in the province are reasons of public policy that are compelling, and when considered together, are decisive in this case.”⁹ There are three elements at play here: “grossly uneven bargaining power”; “quasi-constitutional privacy rights”; and “the importance of adjudicating [those rights] in the province” as matters of public policy. Together, these three elements represent a recalibration of rights protection with regard to an increasingly powerful private sector in the technologically enabled information economy.

I. THE CONSUMER CONTRACT CONTEXT: GROSSLY UNEVEN BARGAINING POWER IN ONLINE CONTRACTS OF ADHESION

The idea of protecting weaker parties from the potential abuses of more powerful ones undergirds both the Charter and consumer protection law. The Charter in large part protects against government failure to serve as a guardian of the rights of more vulnerable people, both as an institution and as an expression of dominant

⁹ *Douez*, *supra*, note 1, at para. 4.

majority will in a democracy.¹⁰ Consumer protection statutes aim to redress the power imbalance between commercial entities and consumers by providing consumers with both rights and procedures for addressing violation of those rights.¹¹ As corporate commercial interests in the digital realm determine both the terms of contractual relations with consumers and the overall structure of information flow (including its commercial exploitation), it has long been recognized that consumer protection principles must assume a primary role in online rights protection, and that forum selection clauses in particular are troubling derogations from consumer protections.¹²

The three sets of reasons in *Douez* do not dispute that consumers are the weaker party in transactions with online service providers, including Facebook: they differ in the role that they permit courts to take in bringing consumer protection to the fore when considering whether to enforce a forum selection clause in a consumer contract. Justice Karakatsanis casts the consumer context as a sufficiently distinguishing factor capable of justifying alteration of the test for enforceability set out in *Z.I. Pompey Industrie v. ECU-Line N.V.*, which, unlike *Douez*, involved “sophisticated commercial entities”.¹³ As she writes,

But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its

¹⁰ See, for instance, the case law regarding s. 2(d) freedom of association (e.g., *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, 2015 SCC 1, at para. 58 (S.C.C.)), or discussion of s. 15 equality and s. 7 (see Jennifer Koshan, “Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown” (2013) 22(1) *Constitutional Forum Constitutionnel* 31-46).

¹¹ See, for instance, Freya Kodar, “Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia” (Fall 2011) 34 *Dal. L.J.* 443.

¹² U.S. Federal Trade Commission, *supra*, note 1.

¹³ *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] S.C.J. No. 23, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.), cited in *Douez*, *supra*, note 1, at para. 35.

discretion to deny a stay of proceedings, depending on the other circumstances of the case.¹⁴

The two-step test set out in *Pompey* (first, whether the contract/clause is valid; second, whether there is “strong cause” — according to traditional jurisdiction determining factors — for setting the forum selection clause aside) must be modified to include these additional factors in the second step. That is, online consumer contracts are forged in circumstances calling for expansion of the relevant factors beyond the traditional jurisdictional factors. Justice Karakatsanis sees this expansion as an “appropriate incremental response of the common law to a different context”, a move that is “especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions” making it “necessary to keep private international law ‘in step with the dynamic and evolving fabric of our society’”.¹⁵

Moreover, while the general enforceability of forum selection clauses in commercial contracts serves the public policy goals of certainty and support for party autonomy, serving those goals in the consumer context is better achieved by generally *not* enforcing such clauses where doing so would deprive consumers of rights where they have had no power to negotiate, so that “instead of supporting certainty and security, forum selection clauses in consumer contracts may do ‘the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account’”.¹⁶ Nonetheless, Karakatsanis J. does not go so far as to consider forum selection clauses in online consumer contracts to be *generally* unenforceable, without the additional consideration of what rights are at stake.¹⁷

¹⁴ *Id.*, at para. 33.

¹⁵ *Id.*, at para. 36, citing *Salituro*, *supra*, note 6, at 670.

¹⁶ *Id.*, at para. 33, citing Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7.

¹⁷ *Id.*, at para. 39. This is a point of difference with Abella J.’s concurring reasons. For an account of the inconsistency with which Canadian courts have or have not enforced forum selection clauses in consumer contracts, see Pavlović, *supra*, note 2.

Justice Abella's concurring reasons do go further along this path, by locating the analysis in the first stage of the *Pompey* test. She finds forum selection clauses in online consumer contracts to be essentially unconscionable, in that they are always forged in a context of power imbalance and are unfair to the weaker party whenever any rights are lost or made more difficult to enforce.¹⁸ The McLachlan C.J.C. and Côté J. dissent, on the other hand, stresses that power inequality is a feature of many contracts, and so there must be some stronger element of procedural unfairness as well as a bad bargain for the weaker party — as supported by evidence in each case — for courts to decline to enforce contractual terms.¹⁹ The dissent would further not expand the factors considered in the “strong cause” test from *Pompey* beyond the traditional factors determining appropriate jurisdiction, and would leave the decision to invalidate forum selection clauses in consumer contracts to legislators, noting that here British Columbia, unlike some other jurisdictions, has not expressly done so.²⁰

The difference in approaches by the majority and the dissent falls along the two types of legal analysis that Arthur J. Cockfield identifies as common judicial responses to technological change: “(1) a ‘liberal’ approach that is more sensitive to the ways that technological change affects interests, while often seeking legal solutions that are less deferential to legal precedents and traditional doctrine; and (2) a ‘conservative’ approach that relies more on traditional doctrinal analysis and precedents.”²¹ Consumer contracts of adhesion have posed issues of power imbalance since

¹⁸ *Douez, id.*, at paras. 114-116. Justice Abella argues (at para. 99) “it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer’s access to possible remedies.” In support she cites numerous academic sources regarding the gross unfairness of forum selection clauses to consumers (at para. 94) and notes that some jurisdictions have invalidated such clauses in consumer contracts via statute (at para. 103).

¹⁹ *Id.*, at para. 145.

²⁰ *Id.*, at paras. 143-144.

²¹ Arthur J. Cockfield, “Towards a Law and Technology Theory” (2004) 30 Man. L.J. 383, at para. 2 [hereinafter “Cockfield”].

they became common in the early 20th century.²² The majority's "liberal approach" in *Douez* responds to the ubiquity of trans-border adhesion contracts in the online environment, where those contracts routinely specify forums outside the home jurisdiction of the consumer. The decision further responds to the fact that this transaction format grew alongside passage, implementation and gradual strengthening of private sector privacy legislation which in turn represents a response to "an era in which technology increasingly facilitates the circulation and exchange of information" and consequently features the rapid growth of technologically-facilitated consumer personal data collection and use for commercial purposes.²³ In other words, the majority in *Douez* sees this case as having reached the tipping point where change to the common law rules about when to set aside a contractual forum selection clause is now appropriate.

II. THE QUASI-CONSTITUTIONAL STATUS OF PRIVACY LEGISLATION

Declaring British Columbia's *Privacy Act* (BC *Privacy Act*) to be "quasi-constitutional", and so capable of tipping that scale in favour of refusing to enforce a forum selection clause in a consumer contract, is no doubt a major development for privacy in Canada. The BC *Privacy Act* is among those provincial statutes that reflect a popular will to overcome the reluctance of Canadian common law to adopt privacy torts.²⁴ The BC *Privacy Act* created causes of action for both invasion of privacy and use of a person's name or portrait for commercial purposes without their consent (commonly known as the tort of appropriation of personality).²⁵

²² Edwin W. Patterson, "The Delivery of a Life-Insurance Policy" (1919) 33:2 Harv. L. Rev. 198.

²³ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 3 [hereinafter "PIPEDA"].

²⁴ *Privacy Act*, R.S.B.C. 1996, c. 373 [hereinafter "BC *Privacy Act*"].

²⁵ *Id.*, ss. 1 and 3. The common law "privacy torts" are generally considered to have been inspired by Warren and Brandeis's famous 1890 article on the right to privacy: Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4:5 Harv. L. Rev. 193. William Prosser is generally acknowledged as having categorized the development of the United States' common law torts into four types, which he named "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs"; "Public disclosure of embarrassing private facts about the plaintiff"; "Publicity

The non-consensual use of a person's portrait for advertising is the underlying cause of action claimed in the class action suit that the plaintiffs in *Douez* filed in the British Columbia Supreme Court, rather than in California as designated in Facebook's terms of use and privacy policy.²⁶ The ability of ordinary people who have not already established economic value in commercial use of their persona (e.g., celebrities, sports figures) has also been limited in common law Canada, and a successful class action of this sort would represent a significant development in all Canadians' ability to constrain commercial exploitation of their name or likeness.²⁷ Again, the development of digital technologies that can automatically exploit the portraits of non-famous people for advertising purposes has simply changed the game.

The expansion of "quasi-constitutional" designation to a statute that creates private law causes of action is the latest step in the incremental elevation of privacy to a broadly fundamental right

which places the plaintiff in a false light in the public eye"; and "Appropriation, for the defendant's advantage, of the plaintiff's name or likeness". William L. Prosser, "Privacy" (1960) 48 Calif. L. Rev. 383, at 389. These privacy torts did not uniformly take hold in common law Canada, until very recently. A relatively weak variant of appropriation of a person's name or likeness was established in the 1970s, but the other torts were not fully recognized as common law causes of action until the 2010s by Canadian courts. *Krouse v. Chrysler Canada Ltd.*, [1973] O.J. No. 2157, 1 O.R. (2d) 225 (Ont. C.A.). Statutes creating privacy tort causes of action in various provinces, British Columbia included, aimed to overcome the reluctance of Canadian courts to establish new causes of action for invasion of privacy. Ontario, which does not have a statute establishing these causes of action and so remains subject only to common law, has finally recognized "intrusion upon seclusion" and "publication of private facts", mainly as a result of considering technological change to have greatly increased the risk of harm for privacy invasion. *Jones v. Tsige*, [2012] O.J. No. 148, 2012 ONCA 32 (Ont. C.A.) [hereinafter "*Jones*"]; *Jane Doe 464533 v. N.D.*, [2016] O.J. No. 382, 2016 ONSC 541 (Ont. S.C.J.) [hereinafter "*Doe v. N.D.*"].

²⁶ The class consists of 1.8 million British Columbia Facebook users whose profile portrait was used by Facebook in relation to its "Sponsored Stories" advertising model, whereby the profile picture of a Facebook user who "liked" a product or service would appear on the newsfeed of their "friends" in ad form. *Douez*, *supra*, note 1, at paras. 6 and 81. Facebook faced a similar lawsuit regarding the Sponsored Stories model in its home jurisdiction in California, and discontinued the ad program in 2014. *Fraley v. Facebook Inc., et al.*, no. 111-CV-196193 (Cal. Sup. Ct.), filed March 11, 2011 — this U.S. suit was settled in 2013: 966 F.Supp.2d 939 (2013). Brian Feldman, "Facebook Reaches Settlement in Sponsored Stories Lawsuit" *The Atlantic* (August 27, 2013), <<https://www.theatlantic.com/technology/archive/2013/08/facebook-reaches-settlement-sponsored-stories/311753/>>.

²⁷ Eric H. Reiter, "Personality and Patrimony: Comparative Perspectives on the Right to One's Image" (2002) 76 Tul. L. Rev. 673; Amy Conroy, "Protecting Personality Right in Canada: A Matter of Property or Privacy?" (2012) 1:1 U.W.O. J. Leg. Stud. 3, <<http://ir.lib.uwo.ca/uwojls/vol1/iss1/3/>>.

cutting across public and private law. The constitutional protection of privacy is fairly narrow, as protected primarily by the right to be secure against unreasonable search and seizure in section 8 of the Charter.²⁸ “Quasi-constitutional” status was first lent to the federal *Privacy Act*, which sets out the parameters of proper federal government handling of personal information, and next to those statutes that regulate the handling of personal information by private commercial entities (“PIPEDA”) at the federal level and substantially similar provincial legislation such as Alberta’s *Personal Information Protection Act*.²⁹ The trend toward merger of protection of privacy *vis-à-vis* the government to protection of privacy *vis-à-vis* commercial entities is not discussed by the *Douez* Court *per se*, but rather assumed to follow from the fundamental importance of privacy rights in general:

At issue in this case is Ms. Douez’s statutory privacy right. Privacy legislation has been accorded quasi-constitutional status (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 24-25). This Court has emphasized the importance of privacy — and its role in protecting one’s physical and moral autonomy — on multiple occasions (see *Lavigne*, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66; *R. v. Dymnt*, [1988] 2 S.C.R. 417, at p. 427).³⁰

²⁸ The s. 8, and to a lesser extent s. 7 case law discusses the fundamental importance of privacy generally to democracy, for instance in *R. v. Dymnt*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 427 (S.C.C.) [hereinafter “*Dymnt*”], although the parameters of Charter privacy protection for information privacy have been confined to fairly limited, intimate biographical information in cases such as *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281 (S.C.C.); *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67 (S.C.C.) and *R. v. A.M.*, [2008] S.C.J. No. 19, 2008 SCC 19 (S.C.C.).

²⁹ The cases in the progression recognizing personal data protection legislation as protecting related fundamental values are *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, 2002 SCC 53 (S.C.C.) [hereinafter “*Lavigne*”] (re the federal *Privacy Act*, R.S.C. 1985, c. P-21) [hereinafter “*Privacy Act*”]; *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043, 2004 FC 852 (F.C.) [hereinafter “*Eastmond*”] (re PIPEDA, *supra*, note 23); and *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, 2013 SCC 62 (S.C.C.) [hereinafter “*Local 401*”] (re Alberta’s *Personal Information Protection Act*, S.A. 2003, c. P 6.5 [hereinafter “*Alberta PIPA*”]). What the cross-pollination of protection against unreasonable search and seizure with personal data protection means going forward is an ongoing debate. Lisa M. Austin, “Towards a Public Law of Privacy: Meeting the Big Data Challenge” (2015) 71 S.C.L.R. (2d) 541. See also Michael Power, “‘Personal Information’ in Canada: Is Change Coming?” (2013) blog post, <<http://michaelpower.ca/2013/12/personal-information-in-canada-is-change-coming-2/>>.

³⁰ *Douez*, *supra*, note 1, at para. 59.

The cases cited by Karakatsanis J. as according quasi-constitutional status to “privacy legislation”, *Lavigne* and *Dagg*,³¹ both deal with the federal *Privacy Act*, regarding government disclosure of personal information: it is *Lavigne* that employs the label “quasi-constitutional”, while *Dagg* drew the initial parallel between the *Privacy Act* and the underlying privacy interests protected by section 8 of the Charter in *Dyment*.³²

The move from federal public sector data protection legislation to the private sector is not directly discussed in Karakatsanis J.’s reasons. The trajectory stems from the idea of “quasi-constitutional legislation”, though also not analyzed in *Douez*, which finds its origins in the case law pertaining to human rights legislation as implementing Charter values and capable of trumping other legislation.³³ In using the term “quasi-constitutional” to apply to the *Privacy Act* in *Lavigne*, Gonthier J. draws on an earlier Federal Court ruling, wherein, as he writes “Noël J. of the Federal Court, Trial Division wrote: ‘The enactment by Parliament of Part IV of the *Canadian Human Rights Act*, later replaced by the *Privacy Act*, illustrated its recognition of the importance of the protection of individual privacy. A purposive approach to the interpretation of the *Privacy Act* is thus justified by the statute’s quasi-constitutional legislative roots.’”³⁴ Generally speaking, as Vanessa MacDonnell writes, “quasi-constitutional legislation is fundamental in the sense that it implements constitutional imperatives.”³⁵ Human rights codes implement constitutional imperatives of equality and protection of civil liberties and so are “clear examples of fundamental laws.”³⁶ The historical origins of the *Privacy Act*

³¹ *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63, [1997] 2 S.C.R. 403 (S.C.C.).

³² *Dyment*, *supra*, note 28, at 427.

³³ *Insurance Corp. of British Columbia v. Heerspink*, [1982] S.C.J. No. 65, [1982] 2 S.C.R. 145, at 157-58 (S.C.C.). The term “quasi-constitutional” is applied to human rights legislation by the SCC in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] S.C.J. No. 55, [1996] 3 S.C.R. 566, at 577 (S.C.C.).

³⁴ *Lavigne*, *supra*, note 29, at para. 24, citing *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] F.C.J. No. 1076, [1996] 3 F.C. 609, at 652 (F.C.T.D.) [emphasis of Gonthier J.].

³⁵ Vanessa MacDonnell, “A Theory of Quasi-Constitutional Legislation” (2016) 53:2 *Osgoode Hall L.J.* 508, at 519.

³⁶ *Id.*

within the *Canadian Human Rights Act* therefore confers on the *Privacy Act* the same status. In the case of public sector personal data protection legislation, the constitutional imperative further lies in the fundamental importance of privacy more broadly, as an individual right central to democratic society enshrined in section 8 of the Charter.

Categorizing PIPEDA as “quasi-constitutional” despite its application to commercial entities and not government is also on par with previous treatment of human rights codes as quasi-constitutional, in that human rights codes of course also apply beyond government actors into the private sector. The move again begins in the Federal Court (which is the court with jurisdiction to hear complaints related to PIPEDA as well as the federal *Privacy Act*), in *Eastmond* in 2004, where Lemieux J. writes, “I have no hesitation in classifying PIPEDA as a fundamental law of Canada just as the Supreme Court of Canada ruled the federal *Privacy Act* enjoyed quasi-constitutional status” and citing *Lavigne*,³⁷ for the purpose of holding that the *Canada Labour Code* does not deprive workers in federally regulated industries of availing themselves of the privacy protections and remedy-seeking provisions of PIPEDA.³⁸ The “quasi-constitutional status” of PIPEDA is discussed again by the Federal Court in *Nammo v. TransUnion of Canada Inc.* in 2010, where the Court finds the process of assessing damages for violation of privacy rights under PIPEDA to be analogous to SCC reasoning regarding damages for Charter breaches by government actors, namely as a “meaningful response to the seriousness of the breach and the objectives of compensation, upholding Charter values and deterring future

³⁷ *Eastmond*, *supra*, note 29, at para. 100.

³⁸ *Id.*, at para. 95:

The case before me does not engage the legislative will over an ordinary court action. What we are faced with in this case are two statutory regimes: one provided for under PIPEDA and the other mandated by the *Canada Labour Code*, a situation which the Ontario Court of Appeal faced in *Ford Motor Company of Canada v. Ontario (Human Rights Commission)*, [2001] O.J. No. 4937, where the provisions of the *Ontario Human Rights Act* and the *Ontario Labour Code* were at play. Notwithstanding the fact an arbitrator had ten years earlier ruled the complainant’s discharge was justified, a Board of Inquiry established under the *Human Rights Act* took jurisdiction and ordered his reinstatement.

breaches” and thus concluding that “the same reasoning applies to a breach of PIPEDA, which is quasi-constitutional legislation.”³⁹

In 2013 the SCC indirectly accepted that PIPEDA is quasi-constitutional, by way of its categorization of Alberta’s *Personal Information Protection Act* as quasi-constitutional, stating that

The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as ‘quasi-constitutional’ because of the fundamental role privacy plays in the preservation of a free and democratic society.⁴⁰

It is a short step then from there to *Douez*, where Karakatsanis J. essentially states that all privacy protective legislation is “quasi-constitutional”.⁴¹

III. THE IMPORTANCE OF ADJUDICATING QUASI-CONSTITUTIONAL RIGHTS IN LOCAL COURTS

Given this status of privacy protections as of core importance to democratic society, then, the problem with forum-selection clauses in consumer contracts is two-fold: these clauses both potentially deprive individuals of fundamental rights; and deprive local courts of their central role as guardians and adjudicators of such rights.

Canadian adjudicators have considered this combination of individual and collective value in domestically rooted privacy protection in two previous variants. First, the Federal Court established in 2007 that PIPEDA applies to foreign Internet-based companies that collect, use and/or disclose personal information of Canadians along the lines of the usual “real and substantial connection” test to determine a court’s jurisdiction — in other words, data collection from Canadians occurs “in Canada”

³⁹ [2010] F.C.J. No. 1510, 2010 FC 1284, at para. 74 (F.C.).

⁴⁰ *Local 401*, *supra*, note 29, at para. 19 (emphasis added). Alberta PIPA is “substantially similar” provincial private sector privacy legislation, as set out via an order of the Governor in Council under PIPEDA, *supra*, note 23, s. 26(2).

⁴¹ *Douez*, *supra*, note 1, at para. 59.

regardless of where the company is located.⁴² Second, the Office of the Privacy Commissioner of Canada has invalidated choice of law provisions in consumer contracts, thereby considering PIPEDA to apply regardless of such provisions in terms of service and privacy policies.⁴³ Given this trajectory, the issue of forum selection clauses is coloured by the question of whether a foreign court could or would apply Canadian federal or provincial privacy legislation, and so respect the principle that consumers cannot be compelled to contract out of these privacy protections.

Justice Karakatsanis's discussion of the public policy reasons for refusing to enforce the Facebook forum selection clause builds on the "quasi-constitutional" characterization of British Columbia's *Privacy Act* by considering local courts as uniquely qualified to hear disputes arising from legislation that protects a fundamental right. As she writes, "... And since Ms. Douez's matter requires an interpretation of a statutory privacy tort, only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province."⁴⁴

Further, while Karakatsanis J. acknowledges the importance of forum selection clauses generally, as noted above, she also sees them as by their nature disrupting the general "public good" of local adjudication of claims, in that "forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely 'law-making and applying venues'; they are institutions of 'public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies'"⁴⁵.

⁴² *Lawson v. Accusearch Inc. (c.o.b. Abika.com)*, [2007] F.C.J. No. 164, 2007 FC 125 (F.C.).

⁴³ Office of the Privacy Commissioner of Canada, "After a significant Adobe data breach, customer questions company's security safeguards and the response it provided about impacts on his personal information", PIPEDA Report of Findings #2014-015 (September 3, 2014), <<https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2014/pipeda-2014-015/>>.

⁴⁴ *Douez*, *supra*, note 1, at para. 59. While Karakatsanis J. does not mention it, it is worth noting that the causes of action created under the BC *Privacy Act* have become more common in the last 10 years, though there are still only a handful of cases decided by the British Columbia courts each year. In other words, the interpretation of this legislation is still evolving.

⁴⁵ *Id.*, at para. 25, citing Trevor C.W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014), at 41 [hereinafter "Farrow"].

Collective interests are thus at stake in this problem of when to enforce forum selection clauses in consumer contracts, and the fundamental nature of the rights at issue results in local courts being not only entitled but responsible for protecting “the social, economic, or political policies of the enacting state in the collective interest’.”⁴⁶ As Karakatsanis J. goes on to state,

... Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.⁴⁷

Justice Abella too considered the adjudication of “a fundamental right like privacy” to fall within “the public policy concerns relating to access to domestic courts”.⁴⁸ The dissent strongly disagrees, instead favouring the public policy reasons for enforcing forum selection clauses. The dissent’s reasons mainly stress the established value of predictability for businesses, but also as indirectly benefitting Canadian consumers in that by “reducing litigation risk [businesses] can generate savings that can be passed on to consumers” and that “the certainty which comes with enforcement of forum selection clauses allows foreign companies to offer online access to Canadians.”⁴⁹ The dissent does not address whether the underlying privacy rights at stake should be afforded any special status, and so does not consider whether some more fundamental rights are best adjudicated in a consumer’s home courts.

IV. CONCLUSION: THE CITIZEN-CONSUMER IN THE DIGITAL INFORMATION ECONOMY

The rapid growth of privately-owned digital networks provides the “borderless” technological context for what are often trans-border

⁴⁶ *Douez, id.*, at para. 52, citing Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010) 60 U.N.B.L.J. 12, at 15.

⁴⁷ *Douez, id.*, at para. 58.

⁴⁸ *Id.*, at para. 104.

⁴⁹ *Id.*, at paras. 160-161.

contracts between foreign-based businesses and Canadian consumers.⁵⁰ At the same time, our social world has been increasingly dominated by services provided by a few mainly U.S.-based companies, such that participating in platforms like Facebook becomes a nearly essential means of engaging with friends and family both locally and from afar.⁵¹ Consequently, much of our lives, at least in the developed world, has come to be ruled by terms of service with private companies located in the United States: courts have started to recognize that the privatization of our social spaces, means of gathering and communicating, and means of resolving disputes cannot be allowed to compromise fundamental Canadian rights and values.⁵²

In the course of the enactment of federal private-sector privacy legislation in 2000, Tina Piper complained that PIPEDA failed to live up to its potential to secure substantive human rights-based privacy, and instead was more business-oriented, designed to encourage e-commerce by reassuring consumers that their personal data would be subject to the rules set out in the Act.⁵³ With *Douez*, I am arguing, the substantive human rights-based approach to private sector privacy protection is gaining ground. As with PIPEDA, developing data processing and storage technologies are

⁵⁰ Andrea Slane, "Tales, Techs and Territories: Private International Law, Globalization and the Legal Construction of Borderlessness on the Internet" (2008) 71 Law & Contemp. Probs. 129.

⁵¹ *Douez*, *supra*, note 1, at para. 56.

⁵² Justice Karakatsanis cites Trevor Farrow for support for the principle that adjudication of disputes in local courts is a public good, but Farrow's book goes further, warning that private means of settling disputes, have begun to compromise democratic values more broadly: "Citizens claim, protect, deliberate about, and create rights and law that, in turn, regulate their life choices and activities. Limiting, curtailing, or impoverishing this democratic mechanism through processes of privatization ... will therefore clearly have repercussion for the ways in which we regulate our individual and collective wellbeing." Farrow, *supra*, note 45, at 42.

⁵³ Tina Piper, "The Personal Information Protection and Electronic Documents Act: A Lost Opportunity to Democratize Canada's 'Technological Society'" (Fall 2000) 23 Dal. L.J. 253. As Piper writes,

The protection of personal information as a market commodity results from the consumerization of citizenship, reliance on the market to mediate disputes and the focus on method and self-interest. Short-term results ensue, minimizing or negating the human right to privacy. The commodification of information objectifies human interactions, fragments communities and molds social relations to the market model by relegating information, whose free exchange is vital to the creation and maintenance of communities and relationships, to the status of a market good.

Id., at 9 of 37.

the catalyst for legal change, in that these technologies facilitate business models that greatly enhance the risks to privacy, and courts regularly see the development of privacy-compromising technologies as calling for stronger legal interventions to protect consumers and citizens alike.⁵⁴ As Sharpe J.A. writes for the Ontario Court of Appeal in *Jones*:

It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our social and political order.⁵⁵

In some ways, what Piper calls the “consumerization of citizenship” has continued to intensify, risking depletion of rights that citizens have come to enjoy in democratic societies. The *Douez* decision is evidence of push back against such a trend, by extending citizen-like protections to consumers in the online context where divisions between public and private sectors are undeniably not as meaningful as they once were. Responding to the development of the Internet, mobile digital communications applications, and an ever-growing array of devices that collect and process personal information from users, Canadian courts are increasingly treating private sector privacy protections as having a

⁵⁴ In *R. v. Spencer*, [2014] S.C.J. No. 43, [2014] 2 S.C.R. 212 (S.C.C.), Cromwell J. writes for the Court:

In *Duarte*, the Court distinguished between a person repeating a conversation with a suspect to the police and the police procuring an audio recording of the same conversation. The Court held that the danger is ‘not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words’: at pp. 43-44. Similarly in this case, the police request that the ISP disclose the subscriber information was in effect a request to link Mr. Spencer with precise online activity that had been the subject of monitoring by the police and thus engaged a more significant privacy interest than a simple question posed by the police in the course of an investigation.

Id., at para. 67, citing *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.).

⁵⁵ *Supra*, note 25, at para. 68. The paragraphs in *Jones* citing the development of digital information technologies as a primary justification for Ontario courts’ recognizing the tort of intrusion upon seclusion are in turn quoted in *Doe v. N.D.* to justify establishing the tort of “public disclosure of embarrassing private facts” in Ontario as well. *Doe v. N.D.*, *supra*, note 25, at paras. 39-41.

similar status to public sector privacy protections, including the Charter: *Douez* is the latest instalment furthering this trend. It is evidence of the triumph of Cockfield's "liberal approach" which he concluded "produces superior policy outcomes when technological changes undermine contemporary values and interests."⁵⁶

Gertrude Stein's famous 1937 line "there is no there there" describes changes to the physical environment of the city where she grew up.⁵⁷ The line was adapted by Michael Geist in the title of his 2001 article "Is There a There There?" to discuss issues raised by Internet technologies which threw into question established rules for determining jurisdiction.⁵⁸ With the majority reasons in *Douez*, the quote can again be adapted to "there is a there there" — namely, the decision names Canadian courts as holding the public policy imperative to adjudicate Canadian consumers' privacy rights in the always evolving digital era. The decision plants a stake in the ground, considering the rights of Canadians online to be a matter of sovereign authority, in a political and economic context where the heft of our much larger southern neighbour would otherwise routinely move protection of a fundamental right like privacy outside of Canada.

⁵⁶ Cockfield, *supra*, note 21.

⁵⁷ Gertrude Stein, *Everybody's Autobiography* (New York: Random House, 1937), at 289.

⁵⁸ Geist, *supra*, note 1.